IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
December 18, 2007 Session

STATE OF TENNESSEE v. DAVID FORD

Direct Appeal from the Circuit Court for Marion County
No. 7838 J. Curtis Smith, Judge

No. M2007-00431-CCA-R3-CD - Filed May 7, 2008

Following the execution of a search warrant and seizure of various items from his residence, the defendant, David Ford, was indicted for one count of promotion of methamphetamine manufacturing and one count of initiation of a process intended to result in the manufacture of methamphetamine. He moved to suppress the evidence seized as the result of the search, arguing that the search warrant was void *ab initio* because it was signed by a city court judge and that such judges do not have the authority to issue search warrants. The trial court agreed with this claim, granted the motion to suppress, and dismissed the defendant's indictment. On appeal, the State argues that the trial court erred in finding that city court judges may not issue search warrants. We agree with the State, reverse the judgment of the trial court, and remand with instructions to deny the motion to suppress and reinstate the indictment.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Reversed and Remanded

ALAN E. GLENN, J., delivered the opinion of the court, in which JAMES CURWOOD WITT, JR. and D. KELLY THOMAS, JR., JJ., joined.

Robert E. Cooper, Jr., Attorney General and Reporter; Preston Shipp, Assistant Attorney General; J. Michael Taylor, District Attorney General; and David O. McGovern and Sherry D. Shelton, Assistant District Attorneys General, for the appellant, State of Tennessee.

Ronnie J.T. Blevins, Jasper, Tennessee, for the appellee, David Ford.

OPINION

FACTS

On April 26, 2006, a Kimball City Court judge issued a search warrant for the defendant's home.[1] During the ensuing search, officers found items used in the manufacture of methamphetamine, and the defendant made self-incriminating statements. Subsequently, a Marion County Grand Jury returned a two-count indictment charging the defendant with promotion of methamphetamine manufacturing and initiation of a process intended to result in the manufacture of methamphetamine. The defendant then moved to suppress the evidence obtained as a result of the search warrant, arguing that the warrant was void *ab initio* because the city court judge who signed the warrant lacked the authority to do so.

On January 23, 2007, the trial court entered an order dismissing the indictment and ordering that all evidence obtained as a product of the search warrant be suppressed, holding that the city court judge who signed the warrant was not a "magistrate" under Tennessee law and therefore did not have the authority to issue a search warrant.

ANALYSIS

On appeal, the State argues that the trial court erred in finding that the city court judge was not a magistrate, contending that the court's ruling in this regard is dependent upon a codification error in Tennessee Code Annotated section 40-1-106 which, when compared to the applicable Public Acts, incompletely defines the term "magistrate." The defendant agrees with the trial court's ruling for, in his view, the language of section 40-1-106 compels the conclusion that city court judges are not magistrates, and, additionally, he asserts that the State has waived this argument by not raising it before the trial court.

At the conclusion of the hearing, the trial court explained its findings, subsequently set out in a written order, that a city court judge was not a "magistrate":

> The issue is whether Mr. Gouger was a magistrate as defined by law.
>
> > The Rule 41(a) talks about authority to issue warrants, and a search warrant is to be issued by a magistrate, and TCA 40-6-101 talks about search warrants defined as signed by a magistrate.
> >
> > The point argued by the parties is whether or not Mr. Gouger was a magistrate. The Court finds that Mr. Gouger was not a magistrate. The code section 40-6-101 was changed sometime around 1993. . . . [B]efore that time a city judge was included. I think that is significant in that the legislature in that code section, dealing with search warrants, removed city judges. He is not a city judge with general sessions court jurisdiction, because, again, he's not elected. [The assistant district attorney] pointed out that perhaps the city charter of Kimball makes some

[1] We note that the search warrant is not included in the record on appeal, but the parties agree that it was signed by a city court judge.

> mention of jurisdiction concurrent with general sessions court, but that doesn't, obviously, confer any more jurisdiction than what the law allows. You can't confer that type of legal jurisdiction through a city charter.
>
> There's some reference to the cross references made at the end of 40-6-101. I don't believe that that's authority. What is written in the cross references part, or that follows code sections simply because it refers to some other section that might include a definition of magistrate is not authority. There is a section, 45 maybe 101 or 102 that talks about magistrates within the meaning of that part of the code and that includes city judges of cities and towns, but that code section relates to other matters, not to the issuing of warrants. [The assistant district attorney] mentions United States versus Finch, a 1993 case, but that really does not help him, because it addresses the issue of general sessions judges as magistrates. It doesn't answer the question that we have here.
>
> So in summary, based on this authority, I find that Mr. Gouger was not a magistrate within the meaning of the law in the State of Tennessee that applies to the issuing of warrants, search warrants, thus the search warrant was not properly executed. There was no warrant, thus the evidence would be suppressed.

Initially, we note that the basis for the trial court's ruling is not entirely clear, for Tennessee Code Annotated section 40-6-101, upon which the court relied, defines not "magistrate" but, rather, search warrants: "A search warrant is an order in writing in the name of the state, signed by a magistrate, directed to the sheriff, any constable, or any peace officer of the county, commanding the sheriff, constable or peace officer to search for personal property, and bring it before the magistrate." While this section requires that a search warrant be signed by a magistrate, it does not define the term. However, the parties proceed on appeal as if the court were referring to Tennessee Code Annotated section 40-1-106, which does define the term "magistrate," and we will do likewise.

Among its determinations, the trial court found that the Kimball City Court judge did not have "general sessions court jurisdiction, because . . . he [was] not elected." The defendant then argues on appeal that "[i]t is undisputed that the Municipal Court of the City of Kimball does not have General Sessions jurisdiction nor Criminal Court jurisdiction." However, he does not refer to any part of the record where the parties entered into such a stipulation, and there is no proof as to whether the position of Kimball City Court judge is an elected or appointed position or whether the court has general sessions court jurisdiction. Accordingly, in our *de novo* review of these determinations, we conclude that there is no evidence in the record either as to the manner of selection of the Kimball City Court judge or the jurisdiction of that court. Therefore, we reverse the findings of the trial court in this regard. See State v. Binette, 33 S.W.3d 215, 217 (Tenn. 2000). Additionally, the defendant argues on appeal that "the Kimball City Municipal Judge does not have the power to issue a warrant for the arrest of a person charged with a public offense. This simply is beyond the jurisdiction of an unelected appointed City Court Judge without General Sessions or criminal jurisdiction." Likewise, there is no proof in the record as to the jurisdiction of the Kimball

City Court judge, and the defendant has not cited any authority for making this claim. We decline to take judicial notice of any relevant provisions of the city charter or ordinances which establish the court's jurisdiction or whether the judge is elected or appointed.

Accordingly, since we have concluded that there is no basis in the record for the trial court's findings that the Kimball City Court judge is not an elected position and that the Kimball City Court does not have general sessions court jurisdiction, the only remaining finding for our review is that city court judges may not issue search warrants because they are not included in the definition of magistrate set out in Tennessee Code Annotated section 40-1-106.

The Fourth Amendment to the United States Constitution and Article I, Section 7 of the Tennessee Constitution protect against unreasonable searches and seizures. Searches conducted pursuant to a warrant may be reasonable if supported by an affidavit, sworn before a neutral and detached magistrate, which establishes probable cause for the issuance of the warrant. State v. Stevens, 989 S.W.2d 290, 293 (Tenn. 1999). "[S]earches pursuant to a warrant will rarely require any deep inquiry into reasonableness, for a warrant issued by a magistrate normally suffices to establish that a law enforcement officer has acted in good faith in conducting the search." United States v. Leon, 468 U.S. 897, 922, 104 S. Ct. 3405, 3420 (1984) (citations omitted). When a warrant is signed by one without legal authority to issue search warrants, the warrant is void *ab initio*. United States v. Scott, 260 F.3d 512, 515 (6th Cir. 2001). The usual remedy for an unreasonable search, including one conducted pursuant to an invalid warrant, is exclusion of the evidence derived from the search. See Mapp v. Ohio, 367 U.S. 643, 649, 81 S. Ct. 1684, 1688 (1961).

The issue in this appeal is whether a city court judge is a "magistrate." However, before reviewing that issue, first we must consider the defendant's argument that the State has waived this issue by not raising it in the trial court. As we will explain, the defendant's claims, and the trial court's conclusion that city court judges are not "magistrates" and may not issue search warrants, rely upon a codification error in the Tennessee Code Annotated which, mistakenly, deleted city court judges from the definition of "magistrate" intended by the legislature. The language intended by the legislature for Tennessee Code Annotated section 40-1-106 may be determined by tracing the statute through the Public Acts, a task which yields our conclusion that the version of this statute in the Code is incomplete. The proper administration of justice requires that this error be corrected and that the defendant not profit from a compilation mistake by the Tennessee Code Commission. Thus, we conclude that this case presents an exception to the waiver rule. See State v. Alvarado, 961 S.W.2d 136, 153 (Tenn. Crim. App. 1996).

In order to analyze the State's claim that the omission of city court judges from the definition of "magistrate" in the statute now codified as Tennessee Code Annotated section 40-1-106 resulted from a codification error, we must explore the statute's history. In State v. Lonnie Taylor, No. 86-144-III, 1987 WL 25417, at *9 (Tenn. Crim. App. Dec. 4, 1987), this court set out the language of Tennessee Code Annotated section 40-1-106, as it existed at that time, defining the term "magistrate":

> [The] judges of the Supreme, appellate, chancery, circuit and general sessions throughout the state, judicial commissioners, and county executives in their respective counties, the mayor or chief officer and the recorder of any incorporated city or town, within the limits of their respective corporations, *and the presiding officer of any municipal or city court within the limits of their respective corporations*. (emphasis added).

Thus, as of 1987, city court judges were empowered to issue search warrants.

In 1978, the General Assembly amended the statute to include judicial commissioners in the definition of "magistrates" in section 40-114, as the now section 40-1-106 then was numbered. 1978 Tenn. Pub. Acts ch. 933, § 2. In 1979, the reference to "justices of the peace" was deleted and replaced with a reference to judges of the courts of general sessions. 1979 Tenn. Pub. Acts ch. 68, § 3. In 1993, the General Assembly deleted the language "the mayor or chief officer and the recorder of any incorporated city or town, within the limits of their respective corporations," and added juvenile court judges to the list of magistrates. 1993 Tenn. Pub. Acts ch. 115, § 3; ch. 241, § 55. As we have noted, the trial court, in explaining why city court judges were not magistrates, referred to a 1993 amendment to Tennessee Code Annotated section 40-6-101. However, the 1993 amendment was to section 40-1-106 instead, and in removing mayors, chief officers and recorders from the definition of magistrate, as the legislature intended, the Tennessee Code Commission removed municipal or city court judges as well.

Following these additions and deletions by the legislature, Tennessee Code Annotated section 40-1-106 is intended by the legislature to define "magistrate" to include municipal and city court judges. The following is the definition intended by the legislature as the current definition of "magistrate":

> The judges of the supreme, appellate, chancery, circuit, general sessions and juvenile courts throughout the state, judicial commissioners, and county executives in those officers' respective counties, **and the presiding officer of any municipal or city court within the limits of their respective corporations** are magistrates within the meaning of this title.

However, the language in bold is missing from the version of section 40-1-106 as it currently is set out in Tennessee Code Annotated. The defendant's motion to suppress, the trial court's granting of that motion, and the defendant's arguments on appeal rely upon the incomplete language found in the Code, rather than the correct language derived from the Public Acts. Presumably, the Code's shortened and incomplete definition of "magistrate" results from a codification error. When there is a conflict in the codification process, the Public Act as originally passed controls. State v. Hicks, 835 S.W.2d 32, 37 (Tenn. Crim. App. 1992). Therefore, we conclude that the Kimball City Court judge is a "magistrate," as the term is defined by the language intended by the legislature for Tennessee Code Annotated section 40-1-106, and has the authority to issue search warrants pursuant to section 40-6-101.

By our ruling, we determine solely that the legislature intended city court judges be within the definition of "magistrate," as set out in Tennessee Code Annotated section 40-1-106. We make no determination as to whether the authority pursuant to this statute of a city court judge to issue search warrants would be affected by whether that judge has general sessions court jurisdiction, the authority to issue arrest warrants, or is elected or appointed, for there is no proof in the record as to the jurisdiction or method of appointment of the Kimball City Court judge.

CONCLUSION

Based on the foregoing authorities and reasoning, the judgment of the Marion County Circuit Court is reversed, and the cause is remanded for denial of the motion to suppress and reinstatement of the indictment. We direct that the clerk of court provide a copy of this opinion to the Tennessee Code Commission so that an appropriate correction may be made to Tennessee Code Annotated section 40-1-106.

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ALAN E. GLENN, JUDGE